No. 17-1717, No. 18-18

In the

Supreme Court of the United States

THE AMERICAN LEGION, ET AL., *Petitioners*,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, *Petitioner*,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF *AMICI CURIAE* 1
SUMMARY OF ARGUMENT 2
ARGUMENT 3
I. THE ARGUMENTS AGAINST STANDING HAVE FAR-REACHING IMPLICATIONS 3
II. THE ARGUMENTS AGAINST STANDING ARE NOT PERSUASIVE 9
III. THE ARGUMENTS AGAINST STANDING ARE NOT REALLY ARGUMENTS ABOUT STANDING AT ALL 13
CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

Bond v. United States, 564 U.S. 211 (2011) 14

Catholic League for Religious & Civil Rights v. City and Cnty. of San Francisco, 624 F.3d 1043 (9th Cir. 2010).....9, 11

County of Allegheny v. ACLU, 492 U.S. 573 (1989)..... 4, 6-7

Crawford v. United States Dep't of Treasury, 868 F.3d 438 (6th Cir. 2017).....12

Engel v. Vitale, 370 U.S. 421 (1962) 8-9

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000).....13

Lee v. Weisman, 505 U.S. 577 (1992)..... 4-5, 8

Leibovitz v. N.Y.C. Transit Auth., 252 F.3d 179 (2d Cir. 2001) 12

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)..... 12-13

Lynch v. Donnelly, 465 U.S. 668 (1984).....4, 7

McCreary Cty. v. ACLU of Ky., 545 U.S. 844 (2005).....4, 6

Salazar v. Buono, 559 U.S. 700 (2010)..... 6-7

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).....10

Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963)..... 5, 8-9

Sierra Club v. Morton, 405 U.S. 727 (1972) 13

Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422 (2007). 3-4

Spokeo, Inc. v. Robins, 136 S.Ct. 1540 (2016) 12

Stone v. Graham, 449 U.S. 39 (1980) 4, 7-8

Town of Greece, N.Y. v. Galloway, 572 U.S. 565 (2014) 7

Trump v. Hawaii, 138 S.Ct. 2392 (2018) 14

United States v. Hays, 515 U.S. 737 (1995) 4

United States v. L.A. Trucker Lines, Inc., 344 U.S. 33 (1952) 4

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 10-12

Van Orden v. Perry, 545 U.S. 677 (2005). 4, 6-7

OTHER AUTHORITIES

Carl H. Esbeck, *Unwanted Exposure to Religious Expression by Government: Standing and the Establishment Clause*, 7 CHARLESTON L. REV. 607 (2013). 5-6

INTEREST OF AMICI CURIAE

Amici are scholars who teach and write in the field of constitutional law, and who have particular expertise in the area of religious liberty.[1] Carl H. Esbeck is the R.B. Price Professor Emeritus and Isabelle Wade & Paul C. Lyda Professor of Law Emeritus at the University of Missouri School of Law. Andrew M. Koppelman is the John Paul Stevens Professor of Law at Northwestern University School of Law. William P. Marshall is the William Rand Kenan, Jr. Distinguished Professor of Law at the University of North Carolina School of Law. Jonathan Weinberg is Professor of Law at Wayne State University Law School.[2]

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[1] Counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Blanket consents from all parties are on file with the Clerk.

[2] *Amici* file this brief in our personal capacities as scholars. None of our respective universities takes any position on the issues in this case.

SUMMARY OF ARGUMENT

Petitioners do not attack standing in this case. But a number of petitioners' amici do. Though their arguments differ, these amici all make categorical claims that no one has standing to challenge state-sponsored religious displays.

These arguments should be rejected. They are inconsistent with this Court's precedents regarding both the Establishment Clause and Article III's standing requirements. They also have far-reaching implications; they would work a sea change in the adjudication of Establishment Clause claims. Finally, they conflate merits issues and standing issues, abandoning the traditional distinctions between the two and the logic underlying those distinctions.

ARGUMENT

I. THE ARGUMENTS AGAINST STANDING HAVE FAR-REACHING IMPLICATIONS.

Petitioners do not address standing in their briefs. But a number of amici on the petitioners' side do. And their attacks are far-reaching. Petitioners' amici do not simply attack the standing of the particular respondents before the Court. They do not simply attack the standing of parties to challenge this particular cross. Instead they claim, as a general and categorical matter, that there is no standing to challenge mere religious displays or prayers. "Offended-observer standing is an anomaly," as one amicus puts it. *See* Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Petitioners (hereinafter Becket Fund Br.), at 32; *see also* Brief Amicus Curiae of the American Civil Rights Union in Support of Petitioners, at 7-15; Brief of Amici Curiae American Center for Law and Justice and Lt. Gen. Robert R. Blackman, USMC (Ret.) in Support of Petitioners, at 27-34; Brief of National Association of Counties et al. in support of Petitioners, at 5-14; Brief of Major General Patrick Brady and Veterans Groups Erecting and Maintaining War Memorials as Amici Curiae in Support of Petitioners, at 5-8 (hereinafter, collectively, "amici").

This is a striking claim. For one thing, it necessarily implies that this Court has been getting these cases wrong for generations. Standing, of course, is jurisdictional, so this Court is obligated to consider it before addressing the merits. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (courts "may not assume jurisdiction for the purpose of deciding the merits of

the case"). And this Court is obligated to address it "even if the courts below have not passed on it, and even if the parties fail to raise the issue before us." *United States v. Hays*, 515 U.S. 737, 742 (1995).

But this Court has been deciding religious-display cases on their merits for decades. The Court addressed the constitutionality of state-sponsored Ten Commandments displays in *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), *Van Orden v. Perry*, 545 U.S. 677 (2005), and *Stone v. Graham*, 449 U.S. 39 (1980). It addressed the constitutionality of state-sponsored holiday displays in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) and *Lynch v. Donnelly*, 465 U.S. 668 (1984). None of these cases was decided on standing grounds. All of them were decided on their merits. Of course, we well understand that this Court "is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio." *United States v. L.A. Trucker Lines, Inc.*, 344 U.S. 33, 38 (1952). Even so, if amici are right about their standing arguments, this Court has been acting *ultra vires* consistently for generations. It is hard to believe so many have been so foolish for so long.

And there is, in fact, a Supreme Court holding here on the issue of standing that some amici seem to forget. In *Lee v. Weisman*, 505 U.S. 577 (1992), the Court addressed the constitutionality of government-sponsored prayers at public school graduations. But the Court also addressed justiciability:

> We find it unnecessary to address Daniel Weisman's taxpayer standing, for a live and

> justiciable controversy is before us. Deborah Weisman is enrolled as a student at Classical High School in Providence and from the record it appears likely, if not certain, that an invocation and benediction will be conducted at her high school graduation.

Id. at 584. This passage is short and simple. Deborah Weisman is a public-school student; prayers will be conducted at her graduation; she will come into contact with those prayers, so she has standing to challenge them. Nowhere does the Court suggest that Deborah Weisman's standing arises out of her being forced to pray. Instead what gives her standing is the mere fact that she is subject to hearing the prayers. And all nine Justices seem in agreement on this point—including the four dissenters, who in fact emphasized that Weisman would not be forced to pray but still did not question her standing to sue.

The Court's analysis here may be brief, but its logic is clear and its holding plain. And, as will be discussed later, the doctrine of lower courts in religious-display cases as regards standing is strikingly continuous with this Court's analysis in *Lee*.[3]

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[3] The Court also explicitly found standing in *School of Abington Township v. Schempp*, 374 U.S. 203 (1963). "It goes without saying," the Court said, "that the laws and practices involved here can be challenged only by persons having standing to complain . . . . The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain." *Id.* at 224 n.9. *See also* Carl H. Esbeck, *Unwanted*

Amici's standing arguments are all-or-nothing, by their nature. If exposure to a government-sponsored religious display is categorically insufficient to confer standing, then what is being displayed does not matter. There would be no standing in any religious-display case, however egregious its facts. "There are, of course, limits to the display of religious messages or symbols." *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (plurality opinion). But amici would render those limits judicially unenforceable. So much for the claim of some Justices that "the Establishment Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall." *Salazar v. Buono*, 559 U.S. 700, 715 (2010) (Kennedy, J., joined by Roberts, C.J. and Alito, J.) (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 661, (1989) (Kennedy, J., concurring in judgment in part and dissenting in part). And so much for the claim that religious displays cannot endorse "a particular religious viewpoint," like the government deliberately putting up Protestant versions of the Ten Commandments to side against Catholicism. See *McCreary Cty. v. ACLU*, 545 U.S. 844, 894 & n.4 (2005) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.).

Merits analysis can draw distinctions. It can differentiate between old displays and new ones, *see Van Orden v. Perry*, 545 U.S. 677, 702 (2005)

Exposure to Religious Expression by Government: Standing and the Establishment Clause, 7 CHARLESTON L. REV. 607, 619-632 (2013) (examining, in comprehensive fashion, sixteen Supreme Court cases involving state-sponsored religious messages, with particular attention paid to how the Court addresses the issue of standing in each of them).

(Breyer, J., concurring), or between more ecumenical displays and less ecumenical ones, *see County of Allegheny v. ACLU*, 492 U.S. 573 (1989), or between displays that commemorate religious events and those that commemorate events with both religious and secular elements, *see Lynch v. Donnelly*, 465 U.S. 668 (1984). But standing analysis cannot draw any of these distinctions. It would render all religious displays equally immune to constitutional challenge.

And inevitably, this would spread back to the public schools. After all, the root religious-display case is *Stone v. Graham*, 449 U.S. 39 (1980), which involved Ten Commandments displays in public school classrooms. Forget the "permanent erection of a large Latin cross on the roof of [a] city hall." *Salazar v. Buono*, 559 U.S. 700, 715 (2010) (Kennedy, J., concurring) (citations and quotations omitted). These standing arguments would insulate from judicial review the same cross on the wall of kindergarten public-school classrooms.

Nor can amici's theory be confined to religious displays. There is no standing to challenge governmental symbols, as one amicus puts it, because "the Establishment Clause doesn't protect individuals from feeling offended." Becket Fund Br. at 29. But if that is true, there should be no standing to challenge governmental prayers either. After all, offense is just offense. Whether the source of that offense is visual or auditory has no bearing. Some Justices have been concerned about legislative prayers that "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion," *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 583 (2014), or school prayers that take a

position on "the divinity of Christ," *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

Some amici do attempt to distinguish the school-prayer cases. One amici, for example, does so by arguing that those cases involve "a captive audience" that is "coercively subjected to a government-sponsored religious exercises." Becket Fund Br. at 37. Yet this logic runs into difficulty. For one thing, it would still tend to undo *Stone v. Graham*, 449 U.S. 39 (1980), which involved neither coercion nor a captive audience—"of course there was no *compelled* reading [of the Ten Commandments]," *id.* at 45 n.1 (Rehnquist, J., dissenting) (emphasis added).

And it would also still threaten to undo *Schempp* and *Engel* as well. After all, the students in both *Schempp* and *Engel* could be excused from the religious exercises without penalty. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 207 (1963) ("The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises."); *Engel v. Vitale*, 370 U.S. 421, 423 n.2 (1962) ("Non-participation may take the form either of remaining silent during the exercise, or if the parent or child so desires, of being excused entirely from the exercise."). That was the whole doctrinal point of *Schempp* and *Engel*—that the prayers at issue there were unconstitutional regardless of any coercion. *See Schempp*, 374 U.S. at 223 ("[A] violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."); *Engel*, 370 U.S. at 430 ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing

of direct governmental compulsion."). Amici hesitate to say that the students in *Schempp* and *Engel* were simply offended observers, whose claims should have been rejected on standing grounds. But that is the direction their arguments lead.

This Court's Establishment Clause jurisprudence has been grounded in sensitivity and nuance. But these standing arguments are capable of neither. They would sweep aside generations of Establishment Clause doctrine and all the sensitivity and nuance embedded therein. These arguments are ones the Court should resist.

II. THE ARGUMENTS AGAINST STANDING ARE NOT PERSUASIVE

Amici's standing arguments go against numerous Supreme Court decisions. But they also go against a body of lower-court decisions that have crafted sensible—and remarkably uniform—standing rules for religious-display cases. We do not claim that the circuits have adopted exactly the same test. But the variance between them is strikingly small. As Judge Graber has explained: "The courts consistently have applied the same general legal rules," typically requiring "some level of frequent or regular contact with the display during the course of the plaintiff's regular routine." *Catholic League for Religious & Civil Rights v. City and Cnty. of San Francisco*, 624 F.3d 1043, 1073 (9th Cir. 2010) (Graber, J., dissenting on the issue of jurisdiction but concurring in the judgment).

This implies, of course, that in some cases no one will have standing to challenge a religious display. Say a government makes a religious

statement on a website that no one naturally visits. Or it puts up a religious display where no one naturally goes. In those cases, no one might ever have standing to bring an Establishment Clause challenge. But that conclusion is not distressing—or even remarkable. It flows, in fact, from the Court's general principles about standing. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.").

Moreover, all of this fits neatly with the Court's decision in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). *Valley Forge* involved a transfer of property from the federal government to a religious college. The plaintiffs were a church-state group and four of its employees. After dismissing their claims of taxpayer standing, this Court then turned to the question of whether any of the plaintiffs could claim a "distinct and palpable injury" to themselves. *Valley Forge*, 454 U.S. at 489. The Court thought not:

> Respondents complain of a transfer of property located in [Pennsylvania]. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in Washington, D.C. They learned of the transfer through a news release.

Id. at 486–87.

This logic makes sense in itself, and it accords with everything lower courts have been doing in

religious-display cases. There is an undeniable fact at the bottom of *Valley Forge*'s analysis: If the plaintiffs there had standing, then anyone in the country would have had standing. A simple newspaper subscription would give anyone interested "a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Id.* at 487. This would convert the standing requirements of Article III into a mere pleading exercise.

We have neither trouble nor quarrel with *Valley Forge*; it is entirely consistent with what lower courts have been doing in religious-display cases and with what we propose here. Take, for example, the Ninth Circuit's decision in *Catholic League*, *supra*. There San Francisco had passed a nonbinding advisory resolution, accessible chiefly through the city's website, singling out Catholicism for disapproval because of Catholic Charities' refusal to place children for adoption with gay households. Judge Kleinfeld concluded that the plaintiffs, who were Catholics from San Francisco, could legitimately claim a personal and individualized injury—San Francisco had communicated an anti-Catholic message not just in general, but *to them* in particular. This was what distinguished *Valley Forge*. The plaintiffs bringing suit in *Valley Forge*, Judge Kleinfeld reasoned, were the equivalents of "Protestants in Pasadena suing San Francisco." *Catholic League*, 624 F.3d at 1051–52.

Whatever the proper resolution of *Catholic League*, we submit that Judge Kleinfeld got *Valley Forge* exactly right. The plaintiffs there really did "fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error,

other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485. They had no personalized connection to the dispute; no message was communicated to them that was not equally communicated to hundreds of millions of other Americans.

Some amici put great weight on the *Valley Forge*'s use of the phrase "psychological consequence." They argue it shows that psychological harm is categorically insufficient for standing purposes. But this is not so. The harm in a defamation case, for example, is often psychological. *See Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1549 (2016) ("intangible injuries can nevertheless be concrete"); *Crawford v. United States Dep't of Treasury*, 868 F.3d 438, 453 (6th Cir. 2017) ("concrete is not synonymous with tangible: intangible harms such as those produced by defamation . . . may certainly be concrete enough to constitute an injury in fact"); *see also Leibovitz v. N.Y.C. Transit Auth.*, 252 F.3d 179, 184 (2d Cir. 2001) ("Leibovitz has alleged an actual injury to herself: the emotional trauma she suffered as a result of an allegedly hostile work environment."); *Valley Forge*, 454 U.S. at 486 ("[W]e do not retreat from our earlier holdings that standing may be predicated on noneconomic injury.").

And this Court has recognized observational standing before. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), this Court said that observing changes in the environment was sufficient for standing: "Of course, the desire to use *or observe* an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of

standing." *Id.* at 562-63 (emphasis added). While the plaintiffs in *Lujan* were ultimately held to lack standing, it was because they had only "'some day' intentions" (as opposed to "concrete plans") to travel to the relevant countries to observe the endangered animals. *Id.* at 565. The Court returned to this point in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000): "We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

These holdings alone seem enough to resolve the issue of standing in religious-display cases. Government-sponsored religious displays have value and meaning well beyond aesthetics. If viewing changes in the environment that "lessen[]" its "aesthetic value" counts as sufficient injury for Article III purposes, the injury alleged here should be thought sufficient as well.

III. The Arguments Against Standing Are Not Really Arguments About Standing at All

These last points get at the deep problem with these standing arguments, which is that is they are not really arguments about standing at all. Amici's theory, at bottom, is about the Establishment Clause—not about standing. Amici believe that the Establishment Clause does not forbid the government from putting up religious displays or

sending religious messages. We may see it differently. But regardless of who is right, that dispute is over the merits—over what the Establishment Clause does or does not forbid. It is not a dispute about standing.

As this Court has made clear many times, merits and standing questions are conceptually distinct—whether the plaintiff has suffered the requisite injury to confer standing is separate from the question of whether the plaintiff should succeed on the merits. *See, e.g.*, *Trump v. Hawaii*, 138 S.Ct. 2392, 2416 (2018) (rejecting the claim that "plaintiffs' Establishment Clause claims are not justiciable" because "that argument—which depends upon the scope of plaintiffs' Establishment Clause rights—concerns the merits rather than the justiciability of plaintiffs' claims"); *Bond v. United States*, 564 U.S. 211, 219 (2011) ("[T]he question whether a plaintiff states a claim for relief goes to the merits in the typical case, not the justiciability of a dispute and conflation of the two concepts can cause confusion."). Amici's attempt to repackage their substantive theory of the Establishment Clause into a conclusion that the plaintiff in this case lacks standing therefore should be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should either be affirmed or reversed on grounds other than standing.

Respectfully submitted,

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